

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

WILLIE J. ARMSTRONG HAMILTON, )  
W.C. JONES, CHERYL JENKINS, )  
BRIAN DACUS, ELROY WILLIAMS, )  
DONALD GRIEVES, JOHN LOPEZ, )  
JACK BROWN, JOE GRIEGER, )  
CHERYL PRINCE, and RAYMOND )  
BASS, )

Plaintiffs, )

v. )

R. JAMES NICHOLSON, )  
DEPARTMENT OF VETERANS )  
AFFAIRS, PAUL PULLUM, GENE )  
FERRELL, DENNIS SNYDER, and )  
JOHN PHILLIPS, )

Defendants. )

8:03CV443

ORDER

This matter is before the court on the motion to dismiss, Filing No. 43, filed by the defendants; a motion to extend time to file a resistance, Filing No. 47, filed by the plaintiffs; and a motion for a hearing on the motion to dismiss, Filing No. 51, filed by the plaintiffs. After reviewing the record, the court concludes that the motion to dismiss will be denied at this time, the motion to extend time will be denied as moot, and the motion for a hearing is denied.

Plaintiff Hamilton filed a employment discrimination complaint in this case on October 20, 2003, Filing No. 1. On or about November 15, 2004, the court granted plaintiff until March 15, 2005, to effectuate service on all defendants. Filing No. 21. On January 18, 2005, plaintiff Hamilton requested leave to amend the complaint, and an amended complaint was filed on April 4, 2005. Counsel for the plaintiffs then filed a motion to extend

time to serve the defendants, and the magistrate gave plaintiffs until April 15, 2005, to do so. Plaintiffs then requested permission to file a third amended complaint and to extend time to serve the defendants. The magistrate granted the motion, and plaintiffs filed a fourth amended complaint on June 4, 2005. Filing Nos. 41 and 42. The magistrate ordered that the plaintiffs serve defendants on or before June 27, 2005. The magistrate further stated that no further extensions would be granted absent a showing of due diligence or manifest injustice. *Id.*

On August 11, 2005, counsel for the defendants filed a motion to dismiss for failure of the plaintiffs to adequately serve the defendants. Filing No. 43. Defendants argue that plaintiffs have failed to properly serve them. Federal Rule of Civil Procedure 4(i)(2) provides that service upon federal agencies must include service upon the United States in the manner specified in Federal Rule of Civil Procedure 4(i)(1), which requires that service be effectuated by:

- (A) delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought . . . and
- (B) by also sending a copy of the summons and the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and
- (C) . . . by also sending a copy of the summons and of the complaint by registered or certified mail to the officer and agency.

Fed. R. Civ. P. 4(i) (emphasis added). This case has been pending for two years, and counsel has been involved for ten months. Yet, the court cannot discern from the record whether appropriate service has occurred. Neither the United States Attorney General nor the United States Attorney appears to have been served with a summons and amended complaint. Further, there is no indication that the summonses issued to each individual defendant have in fact been served. Plaintiffs' counsel admits that his office inadvertently

sent the Attorney General and the United States Attorney summonses by regular mail. However, thereafter, plaintiffs' counsel claims he sent the summons and fourth amended complaint by certified mail to these defendants. Thus, he contends that defendants have now been served. He further argues that the individual defendants have been personally served.

Because the plaintiffs have represented to the court that all parties have been appropriately served, the court will deny the motion to dismiss at this time. However, plaintiffs shall file appropriate proof of service for each defendant within fifteen days of the date of this order. Failure to do so could result in dismissal of this suit.

THEREFORE, IT IS ORDERED:

1. Defendants' motion to dismiss, Filing No. 43, is denied at this time, but it is subject to reassertion if plaintiffs fail to file adequate proofs of service;
2. Plaintiffs' motion to extend time to file resistance, Filing No. 47, is denied as moot;
3. Plaintiffs' motion for a hearing, Filing No. 51, is denied; and
4. Plaintiffs shall have fifteen days from the date of this order to file proofs of service with regard to each defendant in this case.

DATED this 19th day of December, 2005.

BY THE COURT:

s/ Joseph F. Bataillon  
JOSEPH F. BATAILLON  
United States District Judge